84-1315

No.

Office-Supreme Court, U.S.
FILED
FEB 16 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STEVEN LOUIS CAPPS - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN TIM McCALL
200 Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
(502) 589-6190

Counsel for Petitioner

Member of the Bar of the Supreme Court of the United States

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

I. Whether a four day delay between the time of arrest and an initial appearance constitutes "unnecessary delay" in violation of Fed. R. Crim. P. 5(a) justifying dismissal of the indictment?

II. Whether forcing an accused, over his objection, to announce that he intended to call no witnesses constituted prejudicial error denying him a fair trial?

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1984

STEVEN LOUIS CAPPS - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Steven Louis Capps, respectfully prays that a Writ of Certiorari be issued to review the Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 20, 1984.

OPINION BELOW

The unpublished opinion of the Sixth Circuit Court of Appeals affirming the petitioner's judgment of conviction for violations of 21 U.S.C. §§ 841(a)(1)(b)(6) and 846 was entered and filed on December 20, 1984, and appears in the Appendix attached hereto. (Appendix A, p. 1a).

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit affirming the petitioner's judgment of convic-

tion and sentence was decided and filed on December 20, 1984. This Court's jurisdiction is invoked under the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provision:

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutory Provisions:

18 U.S.C. §3041 provides:

> For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested

and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such court, together with the recognizances of the witnesses for their appearances to testify in the case.

A United States judge or magistrate shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining to hold the prisoner for trial or to discharge him from arrest.

18 U.S.C. §3481 provides:

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

21 U.S.C. §841(a)(1)(b)(6) provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows: . . .

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

21 U.S.C. §846 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.C., Rules of Criminal Procedure, Rule 5(a) provides:

Initial Appearance Before the Magistrate

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any

person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. §3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

STATEMENT OF THE CASE

The Petitioner, Steven L. Capps, and his co-defendant, Paul Henson, arranged for the shipment of 2,000 pounds of marijuana to Kentucky. Upon its arrival, Capps and Henson met with undercover agents at a restaurant in Elizabethtown, Kentucky. At the direction of Henson, Capps went to a nearby motel, and with the help of Agent Kiefer, hooked a trailer containing marijuana to a pick-up truck. Later the same day, Capps was arrested just over the Jefferson County line in Shelby County, Kentucky. Subsequent to his arrest, the Petitioner and the marijuana were taken to Louisville, which is in the Western District of Kentucky. The marijuana was removed from the trailer and a photograph was taken by the government. The photograph was marked with the date 3/8/84, and the time

of 5:30 p.m. Somewhere between 9:00 p.m. and 10:00 p.m. on March 8, 1984, the Petitioner was lodged in the Jefferson County Jail. He was kept there until approximately 2:30 p.m. on March 9, 1984. Counsel for the Petitioner was contacted about representing him the morning of March 9, 1984. He immediately made telephone calls to the U. S. Attorney's Office, the Federal Marshall's Office, and the U. S. District Court Clerk's Office in an attempt to locate Steven Capps. Counsel was finally able to reach Alexander Taft, an Assistant U. S. Attorney for the Western District of Kentucky. They had numerous conversations concerning the Petitioner and, particularly, when and where he would be taken for his initial appearance. Counsel was informed that somone would be available that afternoon in the Eastern District of Kentucky. Counsel then inquired as to availability of Magistrate George Long in Louisville, Kentucky, to conduct the initial appearance. He further inquired of Assistant U. S. Attorneys in both the Eastern and Western Districts whether it would be possible to take Mr. Capps before a state judicial officer since this was specifically allowed by the federal rules. This did not happen however. Arrangements were made to take the Petitioner to Lexington, in the Eastern District of Kentucky. Counsel arrived at the U. S. Courthouse approximately 3:00 p.m. and proceeded to Judge Scott Reed's office. After introductions and a few minutes wait, counsel for Petitioner was advised tht there would not be an initial appearance of Mr. Capps. The reason

given to counsel was that there was not a court reporter available or any other means of recording the initial appearance. At that time counsel informed Judge Reed's law clerk that a court reporter was not required for an initial appearance. Mr. Capps was eventually taken before a Magistrate on Monday, March 12, 1984, *four days* after his initial arrest.

A Motion to Dismiss based upon the government's "unnecessary delay" in taking Steven Capps before a federal magistrate or a state or local judicial officer was first heard on May 15, 1984. (Appendix C, pp. 7a-13a). The hearing was continued to May 22, 1984. After overruling the Petitioner's Motion to Dismiss, the trial was commenced on May 23, 1984. At the close of the government's case and after the Petitioner's Motion for Directed Verdict of Acquittal on each of the counts, counsel for Capps told the court, out of the hearing of the jury, that he would not make an opening statement nor offer any proof and that he was ready for the case to be submitted to the jury. The court overruled the motion and stated that he would not allow defense counsel to proceed in that manner. Petitioner's counsel objected to the court asking if they would call any witnesses since this called attention to Steven Capps' failure to testify. Once the bench conference concluded, the court asked defense counsel to call a witness for the defendant. The defense was then forced to state not once, but twice, that it did not intend to call any witnesses.

The jury ultimately found Capps guilty on both counts. (Appendix B, p. 5a). The case was then appealed to the United States Court of Appeals, Sixth Circuit, which affirmed the Petitioner's conviction in an Opinion filed December 20, 1984.

REASONS FOR GRANTING THE WRIT

I. The Ruling Below Has Sanctioned a Violation of Rule 5(a) and Further Is In Conflict with Another Circuit as to the Question of When a Delay Becomes "Unnecessary" Within the Meaning of Rule 5(a).

The Sixth Circuit Court of Appeals admitted that there may have been some violations of Rule 5(a) and that the delay between the Petitioner's arrest and initial appearance was excessive, but went on to hold that this did not warrant setting his conviction aside since there was no prejudice, i.e. no confession.

This ruling is in direct conflict with *Morales* v. *United States,* 344 F. 2d 846 (9th Cir. 1965) and *United States* v. *Mayes,* 417 F. 2d 771 (9th Cir. 1969).

Both of the foregoing cases involved violations of Rule 5(a). In *Morales, supra,* the delay was less than twenty-four (24) hours, while in *Mayes, supra,* the delay was seventeen (17) hours. In the instant case the delay was four (4) days and the Petitioner made a prima facie showing that federal magistrates, state and local judicial officers were available.

In *Sanders* v. *City of Houston,* 543 F. Supp. 694 (S. D. Tex. 1982), the court in finding that persons were being wrongfully detained, looked to Rule 5(a) and held as follows:

> Hence, it is the conclusion of this court that when a person has been arrested on a policeman's assessment of probable cause, the person arrested *must* be brought before a judicial officer as soon as possible, but in any event not later than twenty-four (24) hours after the arrest. This limitation will apply as well on a weekend or holiday, and the appropriate magistrates or other judicial officers will make the necessary arrangements to be available to perform such duties on weekends or holidays so that this ruling is strictly observed and enforced.

Wherefore, the Petitioner requests this court to grant its Writ of Certiorari in order to clarify the parameters of when a delay becomes "unnecessary" thereby justifying dismissal of an indictment.

II. Petitioner's Fifth Amendment Privilege Against Self-Incrimination was Violated when the Trial Court Made an Indirect Reference to His Failure to Testify and He was Thereby Denied a Fair Trial.

The Court of Appeals for the Sixth Circuit assumed without deciding that there was error in the Judge's requiring Petitioner's counsel to repeat before the jury that he was not going to call any witnesses for the defense. However, the court said that such error was harmless beyond all reasonable doubt. The Petitioner asserts that this reference to his failure to testify violated his Fifth Amendment privilege against self-incrimination and thereby denied him a fair trial. He further asserts that the court should refrain from any reference whatsoever to an accused's failure to testify

especially when that accused specifically requests the court to allow his case to be submitted to the jury without calling attention to the fact that he will neither testify nor produce any other witnesses. It is an indirect reference such as this which is proscribed by the Fifth Amendment and its statutory counterpart, 18 U.S.C. §3481. Further, the Sixth Circuit has decided this issue in conflict with a prior decision of this Court, *Griffin* v. *State of California,* 380 U. S. 609 (1965), where the Court said: "[W]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."

Where the language used is manifestly intended or of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify, such a transgression of the accused's rights has occurred that a reversal is justified. *Hayes* v. *United States,* 368 F. 2d 814 (5th Cir. 1966).

It was the apparent intent of the lower court to call attention to the Petitioner's failure to testify. It cannot be doubted that once the government's case was concluded for the judge to make the inquiry he did, in the presence of the jury at that point the jury's attention was focused upon the fact that the Petitioner was not going to testify. This transgressed the Petitioner's constitutional right against self-incrimination. *State* v. *Gray,* 503 S. W. 2d 457 (1973).

Wherefore, the Petitioner calls for this court to exercise its power of supervision and grant certiorari inasmuch as the opinion of the Sixth Circuit Court of

Appeals has sanctioned flagrant disregard by the lower court of the Fifth Amendment privilege against self-incrimination.

CONCLUSION

For the reasons set forth above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN TIM MCCALL
200 Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
(502) 589-6190

Counsel for Petitioner

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

84-5465

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STEVEN LOUIS CAPPS, - - *Defendant-Appellant,*

v.

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

OPINION — Filed December 20, 1984

Before: EDWARDS and MARTIN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

Per Curiam. Defendant-appellant Steven Capps was indicted on two counts, one alleging conspiracy to possess 20,000 pounds of marijuana with intent to distribute in violation of 21 U.S.C. §846, and one alleging possession of 2,000 pounds of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1); (b)(6). Appellant was tried and convicted on both counts and sentenced to 14 years confinement on each count, with the sentences to be served concurrently.

It is apparent from the review of the record and the briefs filed in this proceeding that the proofs at trial which

supported the jury verdict of guilty were simply overwhelming. So much so that no evidence was presented on his behalf.

Two appellate issues were argued. The first concerned appellant's claim that there was excessive delay in arraignment in violation of Rule 5(a), Federal Rules of Criminal Procedure. Our review of this record indicates that such probably was the case although various explanations are offered for the delays. While we, by no means, condone any violations of Rule 5(a), and we recognize that there may have been some in this case, appellant does not point out to us how his cause was prejudiced so as to warrant our setting aside his conviction. Specifically, we note that no confession, coerced or otherwise, was arrived at during the period of delay involved.

Appellant's second argument concerns the fact that appellant's counsel who had decided to put on no witness was forced by questioning by the District Judge to say twice in front of the jury, "We intend to call no witnesses your honor." It is appellant's contention on this appeal that this dialogue "singled out" for the jury's attention his refusal to testify and that his conviction should be reversed on that ground.

Testimony at the trial revealed that the defendant was arrested driving a truck loaded with 2,000 pounds of marijuana. In addition there was proof from an undercover agent concerning his purchase of that marijuana in Texas and his assertion that he was going to take the whole 20,000 pounds.

Under these circumstances, assuming without deciding that there was error in the Judge's requiring defendant's counsel to make and repeat before the jury the announcement that he was not going to call any witnesses, we find such error to be harmless beyond all reasonable doubt.

The judgment of conviction is affirmed.

Issued as Mandate: January 14, 1985
Costs: None

A True Copy

Attest:

John P. Hehman, Clerk

(s) By Audrey Crochett
Deputy Clerk

United States of America vs. **United States District Court** for

DEFENDANT: STEVEN LOUIS CAPPS

EASTERN DISTRICT OF KENTUCKY

FRANKFORT

DOCKET NO: 84-2

JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 (3 82)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date at LEXINGTON — MONTH: May, DAY: 24, YEAR: 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL John Tim McCall (Name of Counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FILED MAY 25 1984

FINDING & JUDGMENT

There being a ~~XXXXX~~ verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. to Counts One and Two

Defendant has been convicted as charged of the offense(s) of Conspiracy to possess with intent to distribute marijuana, in violation of Title 21, Section 846, United States Code; Knowingly and intentionally possessing a non-narcotic Schedule I Controlled Substance, marijuana, in violation of Title 21, Section 841(a)(1):(B)(6) United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

FOURTEEN (14) YEARS, Fine of $50,000.00 and Costs of $50.00 on Count
FOURTEEN (14) YEARS, Fine of $50,000.00 and Costs of $50.00 on Count
Aggregate Fine and Costs $100,100.00

Imprisonment on the above sentences are to be served concurrently, the defendant is to stand committed for payment of fine and costs and it is further ADJUDGED that the sentence imposed on Count Two is to be followed by a Special Parole Term of Four (4) Years.

SPECIAL CONDITIONS OF PROBATION

A presentence report was submitted to the Court before imposition of sentence and copies were furnished to counsel, pursuant to Rule 32, FRCrP.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT ON 5-25-84

LESLIE G. WHITMER, CLERK

BY Ruby V. Stinebruner

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON THIS DATE 5-25-84

By Ruby V. Stinebruner

( ) CLERK
( ) DEPUTY

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Bernard T. Moynahan, Jr.

Date May 1984

5a

APPENDIX B

BEST AVAILABLE COPY

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Indictment No. 84-2S

UNITED STATES OF AMERICA

v.

STEVEN LOUIS CAPPS

MOTION TO DISMISS INDICTMENT

Comes the Defendant, Steven Louis Capps, by counsel, Hon. John Tim McCall, and moves the Court to dismiss the above-styled indictment. In support of said motion, Defendant states that the government did not comply with Rule 5 of the Federal Rules of Criminal Procedure.

Defendant states that he was arrested on March 8, 1984 in Shelby County, Kentucky. He was held in jail until March 9, 1984 when he was brought to Lexington, Kentucky at approximately 3:30 p.m. At that time, his attorney, Hon. John Tim McCall, appeared in Judge Scott Reed's office and advised the Court that he was prepared to represent the defendant who was present in the building and to be arraigned on the complaint.

Defendant's counsel was advised that there was no court reporter available and therefore Judge Reed would not allow an initial appearance before him on this matter. (See Exhibit A attached hereto.)

A copy of the criminal complaint which was tendered on March 9, 1984, at the United States Magistrate's Office is also attached hereto and marked Exhibit B.

The initial appearance before the Magistrate, the Hon. James F. Cook, was held on Monday, March 12, 1984, four days after this defendant's initial arrest.

WHEREFORE, the Defendant moves the Court to dismiss this Indictment against him.

(s) John\Tim McCall
John Tim McCall
200 Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
Counsel for Defendant
Steven Louis Capps

CERTIFICATE

This is to certify that a copy hereof was mailed to James Arehart, Assistant U. S. Attorney, 326 Federal Building, Lexington, Kentucky 40507, and to Frank G. Gilliam, Attorney for Paul Hinson, Co-defendant, 304 Security Trust Building, Lexington, Kentucky 40507, this 10th day of May, 1984.

(s) John Tim McCall
John Tim McCall

EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Indictment No. 84-2S

UNITED STATES OF AMERICA

v.

STEVEN LOUIS CAPPS

AFFIDAVIT OF JOHN TIM McCALL

Comes John Tim McCall, Attorney at Law, who after being duly sworn, states as follows:

1. That he was contacted to represent the defendant, Steven Louis Capps, on Friday, March 9, 1984, at approximately 10:00 a.m. in the morning.

2. That from 10:00 until 1:00 p.m., he had various telephone conversations with Mr. Alexander Taft, of the United States Attorney's office of the Western District of Kentucky, and with the office of Magistrate James F. Cook.

3. The Affiant was advised by Magistrate Cook's office that he was out of the office that day. The Affiant was further advised by Mr. Taft that arrangements had been made for Judge Scott Reed to conduct an initial appearance before him at approximately 2:30 p.m. in Lexington on Friday, March 9, 1984.

4. The Affiant drove to Lexington and presented himself before Judge Reed at approximately 3:00 p.m. on that date. The Affiant also appeared at the U. S. Attorney's office and talked to Mr. Robert Trevey and spoke with two

agents of the DEA who had brought the defendant, Steven Louis Capps, with them to Lexington. The Affiant was told by Judge Reed's office that there would be no initial appearance that day because they did not have a court reporter available.

5. The Affiant further states that he offered early in the day to have this matter heard in the Western District of Kentucky or before any available magistrate in the state of Kentucky. The Affiant further states that at all times he was ready, willing and able to have his client appear before a state or local judicial officer authorized by 18 U.S.C. §3041 and made that fact known to the U. S. Attorney's office.

6. Further Affiant sayeth not.

(s) John Tim McCall
John Tim McCall
200 Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
Counsel for Defendant
Steven Louis Capps

COMMONWEALTH OF KENTUCKY }
COUNTY OF JEFFERSON }

Subscribed, sworn to and acknowledged before me by John Tim McCall, this 10th day of May, 1984.

My commission expires: 12/1/87.

(s) Frances E. Unclebach
Notary Public
State at Large, Ky,

EXHIBIT B

CRIMINAL COMPLAINT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON, KENTUCKY

UNITED STATES OF AMERICA

v.

STEVEN CAPPS

DISTRICT: Eastern District of KY
DOCKET NO.
MAGISTRATE'S CASE NO.: 84-5018M

Complaint for violation of Title 21 United States Code § 841(a)(1)

NAME OF JUDGE OR MAGISTRATE	OFFICIAL TITLE	LOCATION
James F. Cook	U.S. Magistrate	Lexington, KY

DATE OF OFFENSE	PLACE OF OFFENSE	ADDRESS OF ACCUSED (If known)
3-8-84	Shelby County, KY	1116 Highway 44 East Shepherdsville, KY 40165

COMPLAINANT'S STATEMENT OF FACTS CONSTITUTING THE OFFENSE OR VIOLATION:

That Steven CAPPS did knowingly, willfully, and unlawfully possess with intent to distribute marihuana, a Schedule I non-narcotic controlled substance.

BASIS OF COMPLAINANT'S CHARGE AGAINST THE ACCUSED:

See attached affidavit.

MATERIAL WITNESSES IN RELATION TO THIS CHARGE:

RAC Jerry E. Snyder and SA F. R. Price

Being duly sworn, I declare that the foregoing is true and correct to the best of my knowledge.

SIGNATURE OF COMPLAINANT (official title)
WILLIAM J. MALONE
OFFICIAL TITLE
Special Agent

Sworn to before me and subscribed in my presence.

SIGNATURE OF MAGISTRATE(1)

DATE
March 12, 1984

See Federal Rules of Criminal Procedure rules 3 and 54.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON, KENTUCKY

UNITED STATES OF AMERICA

v.

STEVEN CAPPS

AFFIDAVIT

COMES THE AFFIANT, WILLIAM J. MALONE, AFTER FIRST BEING DULY SWORN, STATES AND DEPOSES AS FOLLOWS:

1. He is a Special Agent of the Drug Enforcement Administration and has been so employed for the past eight (8) years.

2. In his capacity as a Special Agent with the Drug Enforcement Administration, he has participated in numerous investigations involving the importation of marihuana and possession of marihuana with the intent to distribute.

3. He and other agents of the Drug Enforcement Administration participated in the investigation involving Steven CAPPS.

4. On Thursday, March 8, 1984, he participated in the arrest of Steven CAPPS. At the time of CAPP's arrest, he was driving a 1979 Ford pickup pulling a U-Haul trailer.

5. The trailer contained an estimated 2,000 pounds of marihuana. The marihuana field tested positive for marihuana.

FURTHER THE AFFIANT SAITH NOT:

William J. Malone
Special Agent
Drug Enforcement Administration

Sworn to and subscribed before me on this 12th day of March 1984.

James F. Cook, U. S. Magistrate